IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

FRIDAY, THE 12TH JANUARY 2007 / 22ND PAUSHA 1928

CRL.A.No. 1180 of 2004(A)

SC.31/2003 of SPL.COURT (NDPS ACT CASES), VADAKARA

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APPELLANT/ACCUSED:

BIJU JOSEPH, S/O. JOSEPH, CONVICT NO.9508,
CENTRAL PRISON, KANNUR.

BY ADVS. ADV.C.K.SAJEEV(STATE BRIEF)
SRI.C.K.SAJEEV (STATE BRIEF)

RESPONDENT/STATE:

STATE OF KERALA, REPRESENTED BY A
PUBLIC PROSECUTOR.

BY PUBLIC PROSECUTOR SRI. C.M. NAZAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 12/01/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.THANKAPPAN, J.

CRL. APPEAL NO. 1180 OF 2004

Dated this the 12th day of January, 2007

JUDGMENT

The appellant is the accused in Sessions Case No.31 of 2003 on the file of the Special Judge (N.D.P.S. Act Cases), Vadakara. He faced trial for the offence punishable under Section 20(b)(ii)(B) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (Amendment) Act, 2001 (hereinafter referred to as "the N.D.P.S. Act").

2. The prosecution case against the appellant was that on 4.4.2002 at 12.20 p.m., the appellant was found in possession of 2.500 Kgs. of ganja. To prove the case against the appellant, the prosecution examined PWs.1 to 5 and produced Exts.P1 to P11(c) as well as MOs.1 to 3. On closing the prosecution evidence, the appellant was questioned under Section 313 Cr.P.C. The appellant denied the allegations levelled against him and stated that he was an employee of Venadu Hotel, Kozhikode and that he was arrested by the police while he was waiting for an autorickshaw. DW.1, the Manager of Venadu Hotel was examined to prove the case of the appellant. However, relying on the evidence

adduced by the prosecution, the trial court found the appellant guilty under Section 20(b)(ii)(B) of the N.D.P.S. Act, convicted him thereunder and sentenced him to undergo rigorous imprisonment for a period of three years and to pay a fine of Rs.25,000/- and in default of payment of fine, to undergo simple imprisonment for a period of one year. Set off was also allowed under Section 428 Cr.P.C. The above conviction and sentence are challenged in this appeal.

3. The appeal is filed through the jail authorities and the appellant is defended by a State Brief. This Court heard the learned counsel appearing for the appellant as well as the learned Public Prosecutor.

4. The learned counsel appearing for the appellant has raised two contentions: (i) the trial court went wrong in placing reliance on the evidence of PWs.1 and 2 who were police officials as the independent witnesses turned hostile to the prosecution and (ii) the trial court ought to have taken into account the fact that PW.1 had not complied with the provisions of Section 50 of the N.D.P.S. Act and had violated the provisions of Section 100 Cr.P.C. while conducting search on the body of the appellant.

5. PW.1 was the Circle Inspector of Police, Kasaba Police Station, Kozhiode who detected the offence and arrested the accused on 4.4.2002. He stated that he reached the spot on getting reliable information that a person aged about 22 years had ganja with him for sale near Thalikkulam in Kozhikode town and that on reaching the spot he saw the appellant. PW.1 further deposed that a search was conducted in the presence of independent witnesses and it was found that the appellant had a plastic bag with him which contained ganja. This witness also stated that the contents of the bag was weighed, sample was taken for chemical analysis and the appellant was arrested at the spot. The contraband article was seized as per Ext.P3 seizure mahazar. PW.1 further stated that before searching the body of the appellant, he had asked him whether he wanted the search to be conducted in the presence of Gazetted Officers and that the appellant had answered in the negative. PW.2 was the Sub Inspector of Police, Crime Squad, Kozhikode who had accompanied PW.1. He stated that the search and seizure were conducted in his presence. His evidence supports the version given by PW.1. He identified the appellant as the person from whom ganja was seized by PW.1. PW.4 was the Assistant Commissioner of Police, Kozhikode South who continued the investigation and got the sample analysed. Ext.P9 is the chemical analysis report. PWs. 3 and 5 were the independent witnesses who were present at the spot when PW.1

conducted search and seized the contraband article from the appellant. Though these witnesses turned hostile to the prosecution, they admitted their signature in Ext.P3 seizure mahazar. Exts.P10 series and P11 series are portions of the statements given by PWs.3 and 5 respectively under Section 161 Cr.P.C. The court below did not place much reliance on the evidence of these witnesses.

6. The trial court considered the evidence of PWs.1, 2 and 4 and found that the prosecution had succeeded in proving that the appellant was found in possession of 2.500 Kgs. of ganja. The trial court also found that PW.1 had not violated any of the provisions of the N.D.P.S. Act or Cr.P.C. while conducting search on the body of the appellant and seizure of the contraband article as the plastic bag containing the ganja was seen in the hands of the appellant. Section 100 Cr.P.C. is intended to apply only in a case where search and seizure are made from a closed place. The appellant was standing in an open place and hence the above provisions are not applicable in the present case.

7. Learned counsel for the appellant now submits that the punishment awarded is excessive. The learned trial Judge considered this point and found that though the appellant was a first offender, the offence

committed by him was a serious one for which imprisonment upto a term of ten years can be awarded. The trial court only awarded rigorous imprisonment for a period of three years. Considering the gravity of the offence committed by the appellant, this Court is of the view that the sentence awarded by the trial court does not call for any interference.

The Crl. Appeal is accordingly dismissed, confirming the conviction and sentence ordered by the trial court.

(K.THANKAPPAN, JUDGE)

sp/

K.THANKAPPAN, J.

CRL.A.NO.1180/2004

JUDGMENT

12TH JANUARY, 2007